pursuant to a search warrant that was obtained after police entered his house and arrested him without a warrant. That contention lacks merit.

a. In *Payton* v. *New York*, 445 U.S. 573 (1980), this Court held that it was "presumptively unreasonable" for officers to enter a suspect's house in order to arrest him without a warrant. *Id.* at 586. The Court had no occasion, however, to address "the sort of emergency or dangerous situation, described in our cases as 'exigent circumstances,' that would justify a warrantless entry into a home for the purpose of either arrest or search." *Id.* at 583. Although this Court has recognized that "probable cause plus exigent circumstances" will justify entry into a house, *Kirk* v. *Louisiana*, 536 U.S. 635, 638 (2002) (per curiam), it has never set out a definitive test for determining the existence of "exigent circumstances." Nevertheless, the Court has noted that a lower court "applied essentially the correct standard" when it observed that (1) "a warrantless intrusion may be justified by hot pursuit of a fleeing felon, or imminent destruction of evidence, or the need to prevent a suspect's escape, or the risk of danger to the police or to other persons inside or outside the dwelling"; (2) "in the absence of hot pursuit there must be at least probable cause to believe that one or more of the other factors justifying the entry were present"; and (3) "in assessing the risk of danger, the gravity of the crime and likelihood that the suspect is armed should be considered." *Minnesota* v. *Olson*, 495 U.S. 91, 100 (1990) (citations omitted); cf. *Welsh* v. *Wisconsin*, 466 U.S. 740, 753 (1984) (noting that "an important factor to be considered when determining whether any exigency exists is the gravity of the underlying offense for which the arrest is being made").

Consistent with the standard approvingly cited in *Olson*, the court of appeals in this case correctly determined that exigent circumstances existed to justify the officers' warrantless entry. Specifically, with regard to the risk of harm, the court of appeals noted that the underlying crime was the murder of a police officer and that the officers had reason to believe that petitioner was armed and dangerous. Pet. App. 18a. With regard to the need to prevent escape, the court of appeals noted that the officers had reason to believe that petitioner had previously "gone to great lengths" to avoid capture. *Ibid.* Petitioner does not challenge the court of appeals' reliance on any of those factors, and the court of appeals' ultimate determination that exigent circumstances existed constitutes nothing more than a "fact-specific application of the proper legal standard." *Olson*, 495 U.S. at 100.

b. Petitioner instead renews his contention (Pet. 15) that exigent circumstances could not have existed because of the time that elapsed before officers entered the house, during which the officers could have sought a warrant. Petitioner seemingly contends (Pet. 17) that the delay in entering the house indicates that exigent circumstances were never present. For the reasons just stated, however, the court of appeals correctly determined that exigent circumstances existed at the time the officers initially arrived at the house. And for the same reasons, the exigent circumstances that existed at the outset did not dissipate while the officers were taking reasonable precautions before effectuating entry.

In several cases, courts have considered the amount of time required to obtain a warrant as one factor in assessing the existence of exigent circumstances. See, *e.g.*, *United States* v. *Rodea*, 102 F.3d 1401, 1404-1405 (5th

Cir. 1996), cert. denied, 520 U.S. 1269 (1997); *United States* v. *Turner*, 650 F.2d 526, 528 (4th Cir. 1981); *United States* v. *Rubin*, 474 F.2d 262, 268-269 (3d Cir.), cert. denied, 414 U.S. 833 (1973). With regard to that factor, however, courts have acknowledged that it may be difficult, even impractical, to obtain a warrant late at night. See, *e.g.*, *Dorman* v. *United States*, 435 F.2d 385, 393 (D.C. Cir. 1970). Although the court of appeals did not expressly address that factor, the district court did note that "[t]he officers were in a rural area operating in the dark of night." 2 R. 1086. Moreover, petitioner concedes (Pet. 17) that, while the officers could have *sought* a warrant in the time that elapsed between the officers' initial arrival and the SWAT team's eventual entry, there is no evidence on whether they could have *obtained* one. To the extent that the amount of time required to obtain a warrant is relevant to the inquiry, therefore, petitioner fails to demonstrate that it cuts in his favor—much less that it outweighs all of the other factors on which the court of appeals relied in determining that exigent circumstances existed. At a minimum, petitioner identifies no conflict with any decision of this Court, or of another court of appeals, that warrants this Court's review.[2]

c. In any event, this case would present a poor vehicle for consideration of any question concerning the

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[2] Petitioner cites (Pet. 15, 18) this Court's decision in *Roaden* v. *Kentucky*, 413 U.S. 496 (1973), for the proposition that exigent circumstances exist only when officers must act "now or never" to preserve evidence of a crime. *Id.* at 505. In *Roaden*, however, the Court was considering the narrower question of the circumstances under which officers could seize material arguably protected by the First Amendment without a warrant—a type of seizure that the Court described as "plainly a form of prior restraint." *Id.* at 504.

exigent-circumstances doctrine. Even if petitioner could show that no exigent circumstances existed (and thus that the earlier entry was invalid), petitioner could not demonstrate that the court of appeals erred by upholding the district court's denial of his motion to suppress evidence seized pursuant to the subsequent search warrant. Evidence seized pursuant to a warrant based in part on illegally obtained information is nevertheless admissible if "sufficient untainted evidence was presented in the warrant affidavit to establish probable cause," *United States* v. *Karo*, 468 U.S. 705, 719 (1984), and the decision to seek the warrant was not based on the fruits of the illegal entry, *Murray* v. *United States*, 487 U.S. 533, 542 (1988). Even without the information allegedly obtained during the earlier entry (*i.e.*, a statement that officers saw firearms in the house), the warrant application contained more than sufficient information to establish probable cause to search petitioner's house. Specifically, the supporting affidavit recited all of the events leading up to petitioner's arrest, including the fact that petitioner had previously fled from police in a similar manner and the fact that the vehicle from which the shots were fired was parked outside petitioner's house. R. 1818. That information, untainted by any observations made during the earlier entry, amply provided probable cause to search petitioner's house for the firearm used to kill James Lamance, and there is every reason to believe that the police would have sought the search warrant in any event. Even if the court of appeals erred in determining that exigent circumstances existed for the initial warrantless entry, therefore, the court of appeals' decision to uphold the admission of the evidence was nevertheless correct.

3. Petitioner also contends (Pet. 11-14) that his sentence was imposed in violation of *United States* v. *Booker*, 125 S. Ct. 738 (2005), and that, even after *Booker*, a heightened standard of proof is required in determining whether the cross-reference to the homicide guideline is applicable. In *Booker*, this Court held that the Sixth Amendment, as construed in *Blakely* v. *Washington*, 542 U.S. 296 (2004), applies to the federal Sentencing Guidelines. 125 S. Ct. at 748-756. In answering the remedial question, the Court then applied severability analysis and held that the Guidelines are advisory rather than mandatory, and that federal sentences are reviewable for reasonableness. *Id.* at 757-769. Petitioner contends that he raised a Sixth Amendment issue at sentencing (Pet. 11), and the court of appeals rejected his claim that the district court's use of a preponderance standard in applying the Guidelines violated due process (Pet. App. 24a). Accordingly, the appropriate disposition of petitioner's case—if the Court chooses to exercise its discretion to consider this untimely petition—is to grant certiorari, vacate the judgment of the court of appeals, and remand the case for further consideration in light of *Booker*. The court of appeals can then decide what effect, if any, that decision has on petitioner's sentence, taking into account any applicable doctrines of waiver, forfeiture, and harmless error. See 125 S. Ct. at 769.

CONCLUSION

If the Court chooses to exercise its discretion to consider this untimely petition, the petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded for further consideration in light of *Booker*. Otherwise, the petition should be denied.

Respectfully submitted.

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Solicitor General
ALICE S. FISHER
Assistant Attorney General
RICHARD A. FRIEDMAN
Attorney

NOVEMBER 2005

(3)

Supreme Court, U.S.
FILED
FEB 1 - 2006
OFFICE OF THE CLERK

No. 05-321

In the Supreme Court of the United States

RICHARD HICKS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR REHEARING

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Rule

Sup. Ct. R. 44 3

Petitioner, RICHARD HICKS, hereby Petitions For a Rehearing From the Order of the Court issued January 9, 2006, denying his Petition for Writ of Certiorari.

I.

On November 2, 2004, the Court of Appeals issued an opinion affirming the conviction and sentence in this case. One issue raised on appeal concerned the Sixth Amendment violation at sentencing of considering enhancement factors not found by a jury. The Court denied this ground on the authority of *United States v. Pineiro*, 377 F.3d 464 (5th Cir. 2004). Petitioner filed a timely Petition for Rehearing that was denied on December 7, 2004. On December 15, 2004, the Court issued the mandate in this case.

II.

On January 12, 2005, the Supreme Court issued its opinion in *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). Under *Booker*, Petitioner's case should result in a resentencing. Petitioner's counsel made a specific and proper objection at the sentencing hearing and therefore this is a preserved *Booker* error.

III.

Following the affirmance by the Court of Appeals and the denial of Petitioner's request for a rehearing by the Court of Appeals, the Petitioner retained attorney Roderick E. Smith of Kansas City, Missouri to file a Petition for Writ of Certiorari to the United States Supreme Court. A substantial amount of money was paid to Mr. Smith to file this Petition but the Petition was never filed by him. Rather, he filed a motion for extension of time that was denied by the Court.

When Petitioner discovered that Smith had not filed the Petition, he retained Gary A. Udashen, current counsel. Although the time for filing the petition had passed, on September 2, 2005, through current counsel, an untimely Petition for Writ of Certiorari was filed.

IV.

The Court directed the Solicitor General to respond to the Petition and the Solicitor General's response stated that the Court had discretion to consider the untimely petition. The response concluded by stating:

> "If the Court chooses to exercise its discretion to consider this untimely petition, the petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded for further consideration in light of *Booker*. Otherwise, the petition should be denied."

V.

As fully set out in the Petition for Writ of Certiorari, there are two undisputed facts in this case:

1. Petitioner was the victim of the malfeasance and criminal conduct of attorney Roderick E. Smith of Kansas City, Missouri. Smith took Petitioner's money but never filed the Petition for Writ of Certiorari. If he had done so, the Petition would have been timely filed.

2. Petitioner has a preserved *Booker* error which, pursuant to the U. S. Constitution, Sixth Amendment will entitle him to a resentencing in this case.

VI.

Pursuant to Rule 44, Supreme Court Rules, rehearing petitions from the denial of a Petition for Writ of Certiorari are limited to "intervening circumstance of a substantial or controlling effect." This case presents such a circumstance.

On January 27, 2006, counsel for Petitioner was informed by the Office of the Chief Disciplinary Counsel of the Supreme Court of Missouri that the Court had issued a temporary order of suspension of the law license of Roderick E. Smith. Counsel was informed that the primary basis for this suspension was Smith's actions in Petitioner's case. This action confirms that the failure to file the Petition in a timely manner was the result of the criminal conduct of Roderick E. Smith. (See Appendix).

VII.

On January 9, 2006, the Court issued an order stating:

"The Petition for a Writ of Certiorari is denied."

Based on the Solicitor General's agreement that the *Booker* ground raised was meritorious, it is assumed the Court declined to exercise its discretion and consider the untimely Petition on its merits. Based on the actions of the Missouri Supreme Court in issuing the interim suspension order on Roderick E. Smith's law license, Petitioner requests that this Petition for Rehearing be granted. Denying the Petition for Writ of Certiorari based on the failure of prior counsel to timely file the petition leaves Petitioner with no remedy to correct the constitutional violation that occurred during his sentencing hearing. In order that justice be served in this case, the Petition should be granted.

Respectfully submitted,

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Attorney for Petitioner

CERTIFICATE OF COUNSEL

The undersigned counsel of record for Petitioner, Richard Hicks, certifies that this Petition for Rehearing from the Court's order of January 9, 2006, denying the Petition for Writ of Certiorari is presented in good faith and not for purposes of delay and is restricted to intervening circumstances of a substantial or controlling effect.

Gary A. Udashen

GARY A. UDASHEN

APPENDIX 1

SUPREME COURT OF MISSOURI
EN BANC

No. SC87372
MBE No. 45574

[Filed January 23, 2006]

In re: Roderick Smith,	)
	)
Respondent.	)
	)

ORDER FOR INTERIM SUSPENSION AND APPOINTMENT OF TRUSTEE

On January 3rd, 2006, the information for interim suspension and appointment of trustee, with exhibits, was filed in this Court. The Court having reviewed the information, exhibits, and Respondent's answer, and finding probable cause to believe that Respondent is guilty of misconduct or is unable to competently represent the interests of his clients and finding evidence that Respondent poses a substantial threat of irreparable harm to the public, it is hereby ordered, pursuant to Rule 5.24(b), that Respondent is suspended from the practice of law until the further order of this Court.

The Court appoints John R. Osgood, as trustee. The trustee shall perform the duties and responsibilities as set out in Rule 5.26.

/s/ _____
Michael A. Wolff
Chief Justice

APPENDIX 2

IN THE SUPREME COURT OF MISSOURI
EN BANC

[Filed January 3, 2006]

IN RE:	)
	)
SMITH, RODERICK	)
	)
106 W. 11th STREET, SUITE 1540	)
KANSAS CITY, MO 64105	)
	)
MO Bar # 45574	)
DOB: 06/25/1965	)
	)
Respondent.	)
	)

COMES NOW the Chief Disciplinary Counsel and in support of this Information for Interim Suspension against Respondent Roderick Smith states as follows:

* * * * *

[p.8]

Richard Hicks Complaint

14. Respondent was unable to competently represent the interests of Mr. Hicks and Mr. Hicks and his family has been

harmed. Pursuant to the holding in *United States v. Booker*, 125 S. Ct. 738 (2005), Mr. Hicks should have been entitled to a new sentencing hearing and possibly a new trial. Due to Respondent's action's Mr. Hicks has most likely lost this right. His family has "also lost the substantial fees that they paid to Respondent. Respondent has also shown utter disregard for his client's welfare in that he has refused to return files that Mr. Hick's appellate counsel needed to attempt to rectify Respondent's incompetent representation.

a. In January 2005, Ms. Geraldine Hicks paid Respondent $10,000 to prepare a petition for certiorari to the United States Supreme Court on behalf of her son, Richard Hicks. The petition was due on March 7, 2005. In 2003, Mr. Hicks was convicted of eight counts of violating 18 U.S.C. 922(g)(8) (unlawfully possessing firearms, and ammunition while subject to a domestic restraining order). Mr. Hicks was sentenced to 180 months in prison. See ¶¶ 1-5 of Geraldine Hicks' Affidavit and ¶¶ 1-6 of Richard Hicks' Affidavit attached to this Information as Exhibits 2 and 3.

b. After Ms. Hicks paid Respondent $10,000, Respondent failed to contact Mr. Hicks, would not accept phone calls from Mr. Hicks and would not return phone calls from Mr. Hicks' family members. See ¶¶ 7, 11 of Ex. 2; ¶¶ 7-10 of Ex. 3; ¶¶ 1-7 of Affidavit of Cathy J. Paris attached to this Information as Exhibit 4.

c. In February 2005, Respondent charged Ms. Hicks an additional $1,000 to travel to Texas. He stated that such trip was necessary for him to obtain the files from Mr. Hicks' former trial and appellate counsel.